Supreme Court, U.S.
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No. 92-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REVEREND ROBERT PEARSON, et al.,

Petitioners,

—vs.—

PLANNED PARENTHOOD MARGARET SANGER CLINIC (MANHATTAN), et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

I. Whether respondents' federal claim under 42 U.S.C. § 1985(3) was so obviously frivolous as to deprive the district court of federal jurisdiction to issue injunctions and contempt orders sustainable on independent state law grounds.

List of Parties

Respondents accept petitioners' list of the parties. In accordance with Rule 28.1 of the Rules of this Court, respondents report that Eastern Women's Center, Inc., Planned Parenthood of New York City, Inc., New York State National Abortion Rights Action League ("NARAL"), Inc., Religious Coalition for Abortion Rights - New York Metropolitan Area, and the National Organization for Women are corporations. None of them have parent or subsidiary companies, but New York State NARAL, Inc. is affiliated with the National Abortion Rights Action League, Inc. and Planned Parenthood of New York City, Inc. is affiliated with Planned Parenthood Federation of America, Inc.

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RESPONDENTS' BRIEF IN OPPOSITION

Counter Statement of the Case

Respondents do not adopt the petitioners' statement of the case, which contains several misstatements of fact and law.

Petitioners are eight individuals who have knowingly violated one or more injunctive orders issued by the United States District Court for the Southern District of New York. These injunctive orders prohibited petitioners from blocking access to women's health clinics where abortions are performed in New York City, and in Westchester, Suffolk and Nassau counties in New York State. The injunctions, which rest on federal and independent state grounds, were unanimously affirmed in 1989 by the U.S. Court of Appeals for the Second Circuit, N.Y. State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y. 1989), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990) and affirmed again in 1992, N.Y. State Nat'l Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992). This

Court denied certiorari with respect to the underlying injunction, and denied certiorari again when petitioners sought certiorari before judgment in this case. Talluto, et al. v. Planned Parenthood, Margaret Sanger Clinic, et al., 112 S. Ct. 957 (1992). Petitioner's arguments have thus been rejected by the court of appeals and this Court twice. This writ merely repeats the same arguments which have already been twice rejected, and it should therefore be denied.

Proceedings Below

The orders violated by petitioners were issued as a result of a 1988 suit brought by respondents against Operation Rescue, an unincorporated association whose members organize and carry out mob blockades of women's health clinics that provide abortion services, and against Operation Rescue leaders Randall Terry, Thomas Herlihy and James Lisante. Originally filed in New York State

Supreme Court, the suit was removed by the defendants to the U.S. District Court for the Southern District of New York. Southern District Judge Ward issued a Temporary Restraining Order on May 4, 1988, a Preliminary Injunction on October 27, 1988, and a permanent injunction on January 10, 1989,[1] upon granting summary judgment to respondents and to plaintiff - intervenor, the City of New York, on two state law claims and a 42 U.S.C. § 1985(3) claim,[2] See generally, N.Y. State Nat'l Org. for Women,

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[1] The injunctive orders were reviewed by the United States Court of Appeals for the Second Circuit in 1989 and unanimously affirmed, with the one modification that the contempt fines be payable to the U.S. Treasury instead of to plaintiffs. N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). The court of appeals held that the district court had subject matter jurisdiction under 42 U.S.C. § 1985(3) and had correctly exercised pendent jurisdiction over respondents' trespass and the plaintiff-intervenor City of New York's public nuisance claims, and that summary judgment was correctly granted on all three claims by the district court. Id.

[2] Petitioners misleadingly describe the proceedings below by referring to respondents' "assertions" of two federal causes of action and "various pendent state causes of action including trespass." Petition at 4. Petitioners fail to clarify that the injunctions are based on three claims which respondents and plaintiff-intervenor the City of New York not only asserted but on which they won summary judgment, which was

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704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). All three injunctive orders make clear that those who oppose women's rights to choose abortion are free to picket and protest. The orders, however, also contain express warnings that knowing violators of the orders who, acting in concert with defendants, physically blockade health care facilities, are subject to civil coercive contempt fines. Petition App. at A-30, A-34, A-38.

The eight petitioners are among thirteen individuals and groups to have been found in contempt by the district court for knowing violations of one or more of the injunctive orders. Twelve contemnors, including the petitioners, consolidated their appeals from two different contempt

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[2] (...continued)
upheld by the court of appeals: trespass and public nuisance under New York State law and 42 U.S.C. § 1985(3) (right to travel violation). N.Y. State Nat'l Org. for Women, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990). The other "asserted causes of action "in respondents' original complaint are irrelevant at this stage.

orders of the district court before the court of appeals. N.Y. State Nat'l Org. for Women v. Terry, 961 F.2d 390 (2d Cir. 1992). The first of the challenged district court judgments held in contempt seven of the petitioners -- Talluto, LaPenna, Lee, Foreman, McMonagle, White and Pearson -- and Operation Rescue, B.O.R.N. (a local affiliate), Terry and Herlihy. Of these contemnors, only Pearson denied acting with notice of the injunction. None of the others disputed knowledge of the injunctions' existence and terms, acting in concert with defendants or any of respondents' other factual allegations of their contumacious conduct; consequently the district court granted summary judgment on contempt against them. Id. The district court held a proceeding to determine the facts as to Pearson's contempt before also finding him in contempt. Id.

The second judgment of the district court held the eighth petitioner, Christopher Slattery, in contempt of two

of the injunctive orders after a separate hearing on disputed facts. Petition App. at A-95-A-107. The district court found all the petitioners to be "persons in active concert or participation with [defendants] who receive[d] actual notice of the order by personal service or otherwise," under Rule 65(d), Fed. R. Civ. P., and who knowingly violated the injunctions' terms.

Prior to the court of appeals reaching a decision, petitioners filed a writ of certiorari before this Court seeking review before the Second Circuit reached its decision. This petition was denied on January 21, 1992. Talluto, et al. v. Planned Parenthood Margaret Sanger Clinic, et al., 112 S. Ct. 957 (1992).

On April 13, 1992, the court of appeals in large measure affirmed the district court's orders. The court held that most of the issues raised on appeal had already been decided by their previous rulings in N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339 (2d Cir. 1989) cert.

denied, 495 U.S. 947 (1990). The Court specifically held that the district court had jurisdiction to enter the injunctions. It reversed only the contempt orders as to respondents-appellants Florence Talluto and Michael LaPenna for improper service, and a Rule 11 sanction assessed against counsel for appellant.[3]

Reasons for Denying the Writ

Although Petitioners seek to portray this case as presenting important legal issues and stress the similarities between this case and Bray v. Alexandria Women's Health Clinic, cert. granted, 111 S.Ct. 1070 (1991) ("Bray"), petitioners miss the only point relevant here. The contempt order appealed from here must be sustained unless plaintiffs' federal claim was so frivolous as to deprive the district court of jurisdiction. If the federal claim, premised on 42 U.S.C. § 1985(3), was clearly substantial, the district

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[3] None of these parties are petitioning this Court.

court had jurisdiction to issue the injunction on the basis of the pendent state law claims, not challenged here. That the § 1985(3) claim was at the very least not frivolous is demonstrated beyond a doubt by the unanimous Second Circuit decision, by substantial support elsewhere in the case law, and by the fact that this Court saw the need to request reargument on the issue in Bray. Thus, even if this Court were ultimately to reverse Bray, petitioners would have no basis for escaping liability for their flagrant and largely undisputed violations of the federal court orders.

The court of appeals explicitly held in this case that the contempt order -- based as it is on federal as well as pendent state law grounds -- was proper on pendent state grounds since the federal claim was substantial. Because the district court's pendent jurisdiction was correctly exercised, even if this Court deems the § 1985(3) claims made in Bray to be without merit and thus holds that no future § 1985(3) claim could justify the exercise of pendent

jurisdiction over state law claims, the injunctions in this case would be upheld on the pendent state law grounds as the underlying federal claims were clearly substantial when the injunctions were issued.

Rule 10 of the United States Supreme Court Rules provides that a petition for a writ of certiorari will only be granted where there are specified reasons for doing so. As none of those reasons obtain here, certiorari should be denied. Petitioners do not cite to any circuit split on the issue of the parameters or standards relating to the exercise of pendent jurisdiction, nor do they suggest a conflict in any decisions regarding this issue. Moreover, there is simply no authority anywhere suggesting that the § 1985(3) claim is frivolous. Clearly, this matter does not rise to the level of importance necessary to justify the grant of certiorari in this case.

Rather, petitioners seek to obtain a second chance to challenge the merits of an underlying order which the court

of appeals has already declared proper. During the segment of this litigation involving the merits of the underlying injunctions, the court of appeals decided the injunction was proper and this Court refused to grant certiorari on that decision. In asking this Court to revisit the merits of the underlying order in this case, petitioners seek to re-review the merits of an injunction applicable to them on state and federal grounds, the propriety of which they have already fully litigated. Accordingly, there is no reason to grant certiorari in this case or to hold it pending the outcome of Bray, and there is no need to consolidate this case with Bray.

I. The Decision Of The Court Of Appeals That Respondents' Claim Under 42 U.S.C. § 1985(3) Is Not Frivolous And That The District Court's Order Of Contempt May Be Upheld Solely On State Grounds Does Not Warrant Review By This Court.

The underlying injunctive orders pursuant to which contempt proceedings were brought against appellants were

premised not only upon 42 U.S.C. § 1985(3), but also upon the independent state law grounds of trespass and public nuisance. Accordingly, the court of appeals recognized that the district court's actions could be sustained on the state law grounds, which have not been separately challenged, so long as the federal claim asserted by plaintiffs "ha[s] substance sufficient to confer subject matter jurisdiction on the court." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966) (citing Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933)). Petition App. at A-13. In other words, petitioners' challenge to the contempt findings and fines against them could only succeed if this Court were to decide that the § 1985(3) claim was wholly frivolous at the time the injunction issued, and that therefore the district court had no jurisdiction to decide the state law claims.

Pendent jurisdiction is proper so long as the federal questions raised in the complaint are "substantial" and the state and federal law claims "derive from a common

nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966).

Where a claim is based on reasonable interpretation of, and not foreclosed by, existing precedent, it meets the substantiality requirement necessary to confer jurisdiction on a federal court over pendent state claims:

> [C]laims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." Hagans v. Lavine, 415 U.S. 528, 537-38 (1974) (quoting Goosby v. Osser, 409 U.S. 512, 518 (1973)) (internal quotations omitted).

See also Levering & Garraigues Co. v. Morrin, 289 U.S. 103, 105-06; Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666-67 (1974).

The court of appeals in this case addressed this very

issue and explained that, "only a federal claim that is "'so attenuated and unsubstantial as to be absolutely devoid of merit'" would preclude the district court's exercise of jurisdiction over the state trespass and public nuisance claims presented here." Petition App. at A-13 (citing Hagans v. Lavine, 415 U.S. 528, 536-37 (1974) (internal quotations omitted).

Here the test of substantiality is obviously met. No prior cases of this Court even suggest that the federal claim is without merit, much less frivolous. The claim has been explicitly endorsed by three courts of appeals and numerous district courts.[4] As the court of appeals concluded, "Given

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[4] Cousins v. Terry, 721 F. Supp. 426 (N.D.N.Y. 1989); Pro-Choice Network of Western New York v. Project Rescue Western New York, Civ. 90-1004A (W.D.N.Y. Feb. 14, 1992); Southwestern Medical Clinics v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989); New York State NOW v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), aff'd, 886 F.2d 1339 (2d Cir. 1989), cert. denied, 495 U.S. 947 (1990); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989), aff'd, 919 F.2d 857 (3d Cir. 1990) (Dist. Ct. issued injunction on federal and state grounds; court of appeals did not reach federal claims but based decision on state grounds and pendent jurisdiction); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 712 F. Supp. 165 (D. Or. 1988), aff'd, 859 F.2d 681 (9th Cir. 1988); Planned

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our ruling in Terry I, and the general state of the law on this issue, see National Org. for Women v. Operation Rescue, 914 F.2d at 585 (collecting cases), it appears clear that plaintiffs-appellees have asserted a substantial federal claim adequate to ground jurisdiction over the state trespass and public nuisance claims." Petition App. at A-13.

Furthermore, this Court declined to grant certiorari to address this precise question in May 1990 and in January, 1992, and given that nothing has changed since that time there is no basis to revisit that question now. Since respondents' § 1985(3) claims are based squarely on arguable interpretations of Supreme Court and other federal precedent, they are, at a minimum, substantial under Hagans and Goosby. Accordingly, as the court of appeals

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Parenthood Assn. of San Mateo County v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); NOW v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), aff'd, 914 F.2d 582 (4th Cir. 1990); cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991); NOW v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990); Women's Health Care Services, P.A. v. Operation Rescue, 773 F. Supp. 258 (D. Kan. 1991).

noted "[e]ven if the Supreme Court were to reverse the Fourth Circuit in Bray, however, it is unlikely that appellants could benefit from that ruling in this case." Petition App. at A-12.[5]

Petitioners have failed to address this standard. While Petitioners label this federal claim with various perjoratives, they never explain how a federal claim with the judicial endorsements that this one has can possibly be called "patently insubstantial." Petition at 11. Apart from reiterating substantive arguments on the merits of the

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[5] It is apparent that petitioners are really concerned with what they variously refer to as the "excessive monetary penalties" assessed against them (Petition App. at 9), the "phenomenally large contempt penalties" (Petition App. at 8), and the "phenomenally large fines" (Petition App. at 3). These fines, however, were delineated in the earlier injunction in this case, the basis of which petitioners appealed and lost. Indeed, petitioners asked this Court to grant certiorari to review the validity of that underlying decision, and this Court denied their request. Petitioners have already had their chance to challenge the validity of the underlying injunction. It is wholly improper for petitioners to attempt to challenge the substantive validity of that underlying injunction again, after they have fully litigated that issue, have been denied certiorari on that issue and have also been found in contempt thereof. Cf. Walker v. City of Birmingham, 388 U.S. 307 (1967) (rather than violating injunction, proper procedure for attacking injunction (and underlying ordinance) is to apply to court to have injunction dissolved, and, if that fails, to follow procedure for expedited appellate review).

§ 1985(3) claims, petitioners advance no authority in support of their position.[6]

In these circumstances, the judgment below, resting as it does on violations of New York trespass and public nuisance law as well as of Section 1985(3), must be affirmed. This Court need not grant certiorari or hold this case pending a decision in Bray.

II. Petitioners Have Failed To Make The Requisite Showing To Consolidate This Case With Bray.

Petitioners ask this Court to consolidate this case with Bray v. Alexandria Women's Health Clinic, cert. granted, 111 S.Ct. 1070, currently pending before this Court. That case has been fully briefed and was argued before the Court

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[6] Petitioners note that United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988), stands for the general proposition that a non-party may attack the subject matter jurisdiction of the lower court to issue the order. Petition at 9. Subject matter jurisdiction, however, either exists or does not exist. The court of appeals' 1989 ruling in this case that the district court had subject matter jurisdiction to enter judgment and issue injunctions applies to non-parties as well as to parties.

on October 16, 1991. It has been scheduled for reargument on October 6, 1992, the first week of the new term.

The purported basis for the request for consolidation is that the cases present similar issues. As demonstrated above, however, there are vast differences between the cases. Though this case and Bray raise similar underlying questions under § 1985(3), the instant case is essentially a contempt case of an injunction the court of appeals explicitly noted was based on federal and state grounds.

The Court would gain no benefit in perspective by consolidating the cases. Belatedly adding this case to the determination of Bray would merely be disruptive. There would be no time to brief this case before the reargument in Bray and that case has already been pending more than a year.

Furthermore, even if petitioners had presented some good faith explanation for their failure to petition earlier,[7]

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[7] Petitioners have sat on their hands for more than 4 months since (continued...)

the Court does not have an obligation to hear all parties who may be interested in a given issue.

III. The Court's Imposition Of Coercive Fines For Civil Contempt Is Fully Consistent With This Court's Precedent As Reflected Most Recently In Spallone v. United States.

Petitioners argue that the civil contempt fines imposed on them were actually penalties for criminal contempt, and therefore could not be imposed without a full trial. However, the fines are a classic example of coercive civil contempt. The district court expressly included the threat of future fines in its injunction to coerce compliance, and only levied the fines after petitioners were found to have violated the order with notice of its terms.

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[7] (...continued)
April 13, 1992, the date that the court of appeals decided this case. Now, more than 10 months after this Court heard oral argument in Bray and 2 months after the Court decided to hear reargument, petitioners, who never even filed an amicus brief in Bray, have discovered a sudden necessity to have their case consolidated with Bray. Such a claim is at best specious. Even more, they filed an application for an extension of time to file their petition on June 30, 1992, and submitted their brief on August 17, 1992.

Petitioners neglect even to mention this Court's most recent affirmation that fines set forth in an order to coerce future compliance are civil, not criminal, contempt sanctions. In Spallone v. United States, 493 U.S. 265 (1990), this Court recognized that an order containing such a sanction, the imposition of which is conditional upon contempt following entry of the order, falls within a court's "inherent power to enforce compliance with . . . lawful orders through civil contempt." 493 U.S. at 276, quoting Shillitani v. United States, 384 U.S. 364, 370 (1966).[8]

Here, as in Spallone, the district court was faced with open contempt of an earlier court order. On October 27, 1988, the District Court Judge (affirming the state court order) entered an order which prohibited petitioners from

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[8] Hicks v. Feiock, 485 U.S. 624 (1988), which petitioners cite, Petition at 15, 16, 18, affirms this same principle. If the petitioner can avoid paying the threatened fine simply by obeying the court's order (here by allowing access to clinics targeted for Operation Rescue demonstrations), the contempt fine is remedial, conditional and civil in nature. Cases cited by petitioners, Petition App. at 15-19, draw the precise distinctions drawn in Spallone, i.e., fines imposed to coerce compliance are civil; fines imposed to punish are criminal.

blocking access to abortion clinics. Petitioners violated that order and were found in contempt. Like the Spallone court, the district court here responded appropriately by including civil coercive sanctions in an order designed to secure future compliance. Petitioners decided not to comply, knowing the consequences. The imposition of the promised civil contempt fines after petitioners' adjudicated violations of the injunction was entirely appropriate. This court need not grant certiorari to restate the principles so recently enunciated in Spallone.

Petitioners have not made the showings necessary to invoke this extraordinary writ. Therefore, the petition for a writ of certiorari should be denied and this case should not be consolidated with Bray.

CONCLUSION

For all the foregoing reasons, respondents respectfully urge this court to deny the petition for a writ of certiorari.

Dated: September 30, 1992
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Respectfully Submitted

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